RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 30 2017
OFFICE OF THE CLERK

No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

BRIEF FOR THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE PRESIDING BISHOP OF THE EPISCOPAL CHURCH, THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, AND THE CHICAGO THEOLOGICAL SEMINARY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

HEATHER E. KIMMEL
UNITED CHURCH OF CHRIST
700 Prospect Avenue East
Cleveland, OH 44115

K. HOLLYN HOLLMAN
JENNIFER L. HAWKS
BAPTIST JOINT COMMITTEE
FOR RELIGIOUS LIBERTY
200 Maryland Avenue, NE
Washington, DC 20002

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
EMERSON SIEGLE
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
202-508-4600
Douglas.Hallward-Driemeier
@ropesgray.com

JOHN MCCLAIN
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036

[Additional counsel of inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MARY E. KOSTEL
COUNSEL TO THE
PRESIDING BISHOP OF
THE EPISCOPAL CHURCH
c/o Goodwin Procter LLP
901 New York Avenue, NW
Washington, DC 20001

DONALD C. CLARK, JR.
CHICAGO THEOLOGICAL
SEMINARY
1407 E. 60th Street
Chicago, IL 60637

PHILLIP H. HARRIS
EVANGELICAL LUTHERAN
CHURCH IN AMERICA
8765 W Higgins Road
Chicago, IL 60631

TABLE OF CONTENTS

Page

Interest of amici curiae 1

Summary of the argument 5

Argument:

I. Public accommodations laws protect religious liberty by accommodating our religious differences 7

II. Religious liberty does not require an exemption where the statute is limited to commercial activity, it exempts places principally used for religious purposes, and the claimant would not directly participate in a religious ceremony 10

III. Granting a religious exemption from CADA on these facts would harm religious liberty and human dignity 16

Conclusion 19

TABLE OF AUTHORITIES

Page(s)

Cases:

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327 (1987) 11, 12

Employment Div. v. *Smith*, 494 U.S. 872 (1990) 7

Heart of Atl. Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 8, 11, 16, 17

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. *EEOC*, 565 U.S. 171 (2012) 7

Lyng v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 7

McCollum v. *Bd. of Educ.*, 333 U.S. 203 (1948) 7

Obergefell v. *Hodges*, 135 S. Ct. 2584 (2015) ... *passim*

Roberts v. *U.S. Jaycees*, 468 U.S. 609 (1984) 11

United States v. *Lee*, 455 U.S. 252 (1982) 11

United States v. *Windsor*, 133 S. Ct. 2675 (2013) 17

Constitution, statute and regulation:

U.S. Const. Amend I 2, 7, 11, 13

Colorado Anti-Discrimination Act, Colo. Rev. Stat. §§ 24-34-601 *et seq.* 8, 10, 12, 18

3 C.C.R. 708-1:10-2(H) 10, 18

Miscellaneous:

The Episcopal Church, *The Book of Common Prayer* (1979) 9

Miscellaneous—Continued: Page

United Church of Christ:

Resolution Marking the Thirtieth Anniversary of the Just Peace Pronouncement by Recommitting Ourselves to be a Just Peace Church, 15-GS-20 (June 29, 2015) 9

Reaffirming Our Commitment to Full Equality for Persons of any Sexual Orientation, Gender Identity or Gender Expression, 15-GS-56 (June 30, 2015) 9

In the Supreme Court of the United States

No. 16-111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

BRIEF FOR THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE PRESIDING BISHOP OF THE EPISCOPAL CHURCH, THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, AND THE CHICAGO THEOLOGICAL SEMINARY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amicus curiae the General Synod of the United Church of Christ is the representative body of the denomination of the United Church of Christ, a Protestant denomination with more than 900,000 members and

[1] Petitioners and respondent Colorado Civil Rights Commission have filed blanket consents to the filing of amicus curiae briefs. Respondents Mullins and Craig consented to the filing of this amicus brief in correspondence that is on file with the Clerk of Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

more than 5,000 churches. The General Synod has consistently spoken on issues of religious liberty and the separation of church and state, resolving to "share the blessings of our heritage of religious freedom, and to sustain that precious heritage by extending the right of religious freedom to groups with which we are not in theological agreement," as well as urging the restoration of religious liberty for all, recognizing that "the United Church of Christ, a denomination devoted to religious liberty" must "raise its voice in protest" when religious freedom is abrogated. The General Synod has also consistently adopted social policy statements urging the full inclusion of all individuals in all institutions of society, from marriage to the marketplace to ministry, regardless of their sexual orientation, race or ethnicity, gender identity, religion, disability, economic status, or citizenship, and was the first Protestant denomination to support a right to marriage for same-sex couples.

The Baptist Joint Committee for Religious Liberty (BJC) serves fifteen supporting organizations, including national and state Baptist conventions and conferences. It is the only denomination-based organization dedicated solely to religious liberty and church-state separation issues and believes that strong enforcement of the First Amendment is essential to religious liberty for all Americans. Since its inception in 1936, the BJC has vigorously supported the free exercise of religion, including by chairing the Coalition for the Free Exercise of Religion which successfully urged enactment of the Religious Freedom Restoration Act.

Amicus Curiae The Most Reverend Michael Bruce Curry is the 27th Presiding Bishop of The Episcopal Church, a hierarchical religious denomination in the United States and 17 other countries. Under the

Church's polity, he is charged with "speak[ing] God's words to the Church and to the world, as the representative of [the] Church." The Church has adopted a resolution "affirm[ing] its support for religious freedom for all persons" and "affirm[ing] religious freedom as a goal to be sought in all societies." The Church has also adopted a rule which provides that "[n]o one shall be denied rights, status or access to an equal place in the life, worship, and governance of [the] Church because of race, color, ethnic origin, national origin, marital status, sex, sexual orientation, gender identity and expression, disabilities or age, except as otherwise specified [in Church rules]." In 2015, the Church adopted a trial rite for the celebration of same-sex marriage, and at the same time "honor[ed]" "the theological diversity of this Church in regard to matters of human sexuality" and confirmed that no ordained person "should be coerced or penalized in any manner" because of his or her "theological objection to or support for" the Church's action in adopting the trial rite, and further required every bishop to "make provision for all couples asking to be married in this Church to have access" to the trial rite.

Amicus Curiae Evangelical Lutheran Church in America (ELCA) is the largest Lutheran denomination in North America and is the fifth largest Protestant body in the United States. The ELCA has over nine thousand member congregations which, in turn, have approximately 3.7 million individual members. These congregations are grouped into and affiliated with 65 synods that function as the regional organizations of this church body. The ELCA was formed in 1988 by the merger of the Lutheran Church in America, The American Lutheran Church, and the Association of Evangelical Lutherans. The ELCA and its predecessor denominations

have continually declared opposition to any attempts by government to curb religious liberty through statutory or administrative measures. The ELCA vigorously supports legislation and policies to protect civil rights and to prohibit discrimination in housing, employment, and public accommodations or services.

Amicus Curiae Chicago Theological Seminary is a leader in theological education, social justice, and societal transformation founded in 1855. While fiercely supportive of religious freedom, the seminary refutes the notion that the diminishment of equal rights to public accommodations resulting in societal division may be explained, excused, or justified by such freedom. The seminary is committed to developing leadership for a more inclusive church and society.

The denominations, conventions, conferences, and congregations represented by amici hold differing views regarding the religious implications of same-sex marriage. Amici respect the right of religious institutions to maintain and practice their own religious tenets, including with respect to marriage. Amici are also committed to protecting the human dignity to which all individuals are entitled. Amici believe that Colorado's public accommodations law as applied here strikes the right balance between respect for religious liberty and the protection of individuals' right to participate in the commercial marketplace free from discrimination. The balance struck by Colorado ultimately promotes the cause of religious liberty and human dignity, in a manner consistent with our pluralist society.

SUMMARY OF THE ARGUMENT

Contrary to the arguments of petitioners and many of their amici, respect for religious liberty does not require upholding petitioners' claim to a religious exemption from Colorado's generally applicable public accommodations law in the circumstances presented here. There may be more challenging cases, including in the context of same-sex marriage, where amici might differ on whether a religious exemption is warranted, but this is not such a case. Respondents Mullins and Craig sought only to purchase from petitioners a cake, which they planned to serve at a reception long after and far from where their wedding ceremony took place. For purposes of the State's interest, and indeed so far as the record reflects, Mullins and Craig's wedding ceremony might have been an exclusively civil ceremony. Thus, application of the State's public accommodations law here does not "disparage" petitioners' sincere "religious and philosophical" beliefs in opposition to same-sex marriage, *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2602 (2015), but rather honors the distinction the Court drew in *Obergefell* between the religious institution of marriage, on which individuals can disagree, and the civil institution of marriage, in which the Constitution guarantees respondents Mullins and Craig a right to participate, *id.* at 2605.

Public accommodations laws like Colorado's generally *promote* religious liberty, by protecting individuals from discrimination on account of their religion. Such laws also promote human dignity, which is itself a religious value, by ensuring that all individuals can access the commercial marketplace on an equal basis. By ad-

vancing these compelling interests, public accommodations laws like Colorado's protect the pluralism that is so vital to American society.

The public accommodations law at issue strikes a respectful balance in that it applies to commercial activities alone and expressly excludes houses of worship from its reach. This ensures that all individuals, including religious and other minorities, are able to access the marketplace with dignity, while protecting the ability of religious individuals and communities to practice their faiths without government interference. That balance applies as well to an institution like marriage that has both a religious and a non-religious, civil component. Religious officials cannot be required to conduct wedding ceremonies outside their religious traditions, and a lay person cannot be required to participate in a religious ceremony, including a religious wedding ceremony, that conflicts with the person's religious faith. In such circumstances, exemptions to secular laws would be warranted. But an exemption is not warranted under these facts. Respecting petitioners' interest in their sincerely-held religious views regarding marriage does not require granting them the right to deny service in the commercial marketplace to couples in connection with the civil, or non-religious aspects of their marriages.

Upholding petitioners' claim on these facts would come at too great a cost to the state's compelling interest in ensuring the ability of each citizen to participate in the commercial marketplace. Petitioners' claim to an individual exemption for commercial activity undermines the precise interest the State seeks to protect. The claim that petitioners are being forced to participate in something they view as religious is not limited in any meaningful way, and would invite a variety of religious

exemptions that would fundamentally change expectations of equality in the commercial sphere. Religious liberty itself would suffer, as religious individuals would be subject to being denied service because the commercial proprietor's religious views differed from theirs.

ARGUMENT

I. PUBLIC ACCOMMODATIONS LAWS PROTECT RELIGIOUS LIBERTY BY ACCOMMODATING OUR RELIGIOUS DIFFERENCES

Although petitioners and some of their amici portray the Colorado Anti-Discrimination Act (CADA) as at odds with religious liberty, public accommodations laws like CADA can offer critical protection to religious liberty in a pluralistic society. As the Court observed in *Employment Division* v. *Smith*, "'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' * * * and [] we value and protect that religious divergence." 494 U.S. 872, 888-889 (1990) (quoting *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961)). The First Amendment protects that pluralism based on "the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Bd. of Educ.*, 333 U.S. 203, 212 (1948). Most fundamentally, the First Amendment squarely "prohibits government involvement in [] ecclesiastical decisions," *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012), and "affords an individual protection from certain forms of governmental compulsion," *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (quoting *Bowen* v. *Roy*, 476 U.S. 693, 699-700 (1986)).

But accommodating the divergent backgrounds and beliefs of individuals in our pluralistic society can also require legal protection from private discrimination, in order to safeguard the ability of each citizen to participate fully in society with dignity. See *Heart of Atl. Motel, Inc.* v. *United States*, 379 U.S. 241 (1964). Creating spaces where we can peacefully coexist despite our differences is critical to the success of the American experiment.

Like many other states, Colorado decided that one of the common spaces in which Coloradans must accommodate others is the commercial marketplace. By enacting CADA, the Colorado legislature required that Colorado businesses serve all individuals in the marketplace on equal terms. The statute prohibits commercial discrimination on the bases of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." Colo. Rev. Stat. § 24-34-601(2)(a).

Public accommodations laws ensure that all individuals are able to enjoy fundamental human dignity in civil society. This Court has repeatedly recognized all individuals are entitled to dignity. See, *e.g.*, *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2608 (2015). Indeed, as the Court long ago observed, *any* "denials of equal access to public establishments" creates a "deprivation of personal dignity." *Heart of Atl. Motel, Inc.*, 379 U.S. at 250.

Public accommodations laws can, and CADA does, promote religious liberty in several ways. As an initial matter, by protecting each person's dignity, public accommodations laws help create the necessary conditions for individuals to fully develop, including spiritually. These laws are therefore consistent with denominational statements made by several amici. For example, The

Episcopal Church's Baptismal Covenant, which reflects the denomination's core beliefs, asks for commitments from persons being baptized as well as all other witnesses to "strive for justice and peace among all people, and respect the dignity of every human being." The Episcopal Church, *The Book of Common Prayer* 305 (1979).

Similarly, the General Synod of the United Church of Christ has strongly advocated for the dignity of all persons in the marketplace and in public accommodations. In 2015, the General Synod recognized that seeking peace with justice requires a just marketplace, "so that all may live in dignity," with the adoption of a resolution recommitting the United Church of Christ to be a Just Peace Church. United Church of Christ, Resolution Marking the Thirtieth Anniversary of the Just Peace Pronouncement by Recommitting Ourselves to be a Just Peace Church, 15-GS-20 (June 29, 2015). In that year, it also reaffirmed its support of public accommodations laws as essential to the dignity of all when it called upon its churches "to advocate for the enactment of local, state and federal laws protecting persons of any sexual orientation, gender identity or gender expression against discrimination in public accommodations, housing and employment." United Church of Christ, Reaffirming Our Commitment to Full Equality for Persons of any Sexual Orientation, Gender Identity or Gender Expression, 15-GS-56 (June 30, 2015). That resolution also reaffirmed "the historic commitment of this church to religious freedom, to the right of all churches and faith communities to maintain and advocate for their own beliefs and practices, and to respectful dialogue within the United

Church of Christ and with other faith communities on issues concerning human sexuality, human dignity and marriage." *Ibid.*

In addition to protecting dignity, public accommodations laws, including CADA, frequently include religious minorities as among those protected. CADA bars discrimination on the basis of "creed," which encompasses "all aspects of religious beliefs, observances, or practices." 3 C.C.R. 708-1:10-2(H). In the absence of such protection, religious minorities might find themselves unable to access the marketplace, which in the extreme could render religious liberty illusory as a practical matter.

To further protect religious liberty, Colorado has ensured that CADA does not intrude upon principally religious spaces. CADA carves out any "church, synagogue, mosque, or other place that is principally used for religious purposes" from the definition of "place of public accommodation." Colo. Rev. Stat. § 24-34-601(1).

Public accommodations laws like CADA thus promote religious liberty in important ways. While specific claims of religious liberty may nonetheless warrant exemptions to public accommodation laws in individual cases, this is not such a case, as discussed below.

II. Religious Liberty Does Not Require An Exemption Where The Statute Is Limited To Commercial Activity, It Exempts Places Principally Used For Religious Purposes, And The Claimant Would Not Directly Participate In A Religious Ceremony

This Court has repeatedly upheld the application of public accommodations laws to commercial activity,

even against claims based in personal liberty. For instance, in the mid-twentieth century, the Court upheld Congress's authority "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments," despite the business proprietor's claims that doing so deprived him of his own liberty. *Heart of Atl. Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964). And, more recently, the Court has reaffirmed that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent," even in the face of a claimed First Amendment right to exclude a class of persons. *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 628 (1984). "[T]he profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society" justified any minor imposition on an organization that was primarily focused on commercial relationships. *Id.* at 632 (O'Connor, J., concurring).

Similarly, when confronting claims for religious exemptions, the Court has frequently stressed the commercial nature of the activity in question. The Court has made clear that "[w]hen followers of a particular [religious] sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States* v. *Lee*, 455 U.S. 252, 261 (1982). Accordingly, "the commercial, profit-making world" presents a special sphere where religious assertions, such as a desire to deny commercial services to a member of the public, often may not be accommodated. *Corp. of Presiding Bishop of Church of Jesus*

Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327, 337 (1987).

The further a law gets from regulating commercial activity, the more appropriate, and sometimes essential, it becomes to recognize religious exemptions. For instance, exemptions necessary for the "furtherance of the autonomy of religious organizations" are warranted, in part because such exemptions in turn "further[] individual religious freedom as well." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 483 U.S. at 342 (Brennan, J., concurring in judgment). CADA recognizes those limits. By exempting any "place principally used for religious purposes" from the definition of "place of public accommodation," Colo. Rev. Stat. § 24-34-601(1), CADA recognizes the need for an appropriate exemption that protects against government interference in religious practice. This exemption makes clear that no church or other religious organization would be forced under CADA to perform a religious wedding for any couple whose marriage would violate the organization's beliefs, including to celebrate the marriage of a same-sex couple if doing so would violate their religious tenets.

And, even in the absence of an express exemption, religious liberty might require an exemption for individuals in certain circumstances, such as where the law might otherwise require a person to participate in a religious ceremony of another faith, or to which the person held a religious objection. A minister or rabbi could not, for example, be required to officiate at a religious wedding that was contrary to the officiant's religion, which, for some clergy, might include a marriage between persons of different faiths, or a marriage between persons

of the same gender. And lay members of a religion likewise should not be coerced to participate in a religious observance that would violate their religious principles.

In this case, however, petitioners seek a much broader exemption that would allow them to refuse on religious grounds to serve same-sex couples, even though providing the service would not require petitioners to participate directly in any religious ceremony. The conduct at issue here—making a cake for sale—is commercial activity for profit. Where the claim for an exemption involves for-profit conduct in the commercial space, the State's interest in protecting the rights of all individuals to participate in the civil marketplace is at its zenith, and claim of the individual seeking the exemption in order to selectively refuse service on religious grounds is at its weakest. Requiring commercial businesses to provide service to all qualified customers does not unduly intrude upon the liberty to practice one's religion. Rather, it ensures that minorities (including religious minorities) are able to participate in the commercial marketplace with dignity.

Petitioners' argument that CADA would require them to participate in a religious ceremony against their faith confuses the religious and civil aspects of marriage, as does their misplaced reliance on this Court's opinion in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). Petitioners observe (Br. 44) that the majority opinion in *Obergefell* disclaimed any intent to "disparage" the sincere "religious and philosophical" beliefs that lead some to oppose same-sex marriage. 135 S. Ct. at 2594, 2602. Indeed, the Court affirmed that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and

their faiths." *Id.* at 2607. While respecting the liberty of religious organizations and persons to hold and teach their own views regarding marriage, the Court clearly distinguished marriage as a *religious* institution from *civil* marriage. The Court's holding was explicit that the religious beliefs of some could not justify "exclud[ing] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605; see *id.* at 2602 (noting that the "same-sex couples seek in marriage the same *legal treatment* as opposite-sex couples" (emphasis added)). While recognizing that some persons find "spirituality" in marriage, the Court's holding was appropriately limited to the "'esteemed institution'" of "'civil marriage.'" *Id.* at 2599 (quoting *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003)).

Petitioners ignore this distinction, and in doing so create confusion regarding how religious liberty is protected for all in the commercial marketplace. According to petitioners, baking a cake to be used in a party celebrating a couple's earlier wedding ceremony necessarily implicates petitioners in a religious ceremony to which they object, but that is not so. It is telling, for example, that the record does not disclose whether respondents Mullins and Craig's marriage ceremony had *any* religious overtones. See J.A. 39 (noting only that the reception marked respondents' "legal marriage" in Massachusetts); J.A. 154 (acknowledging that petitioners had no knowledge whether respondents had, in fact, been married). And, the fact that the celebration was held at a considerable remove, both temporally and geographically, from the wedding ceremony itself, only confirms that petitioners were not asked to participate in a religious ceremony.

Petitioners are, of course, free to regard marriage as a religious sacrament, and to celebrate that religious rite only in a manner and for couples that conform to their religious principles. Petitioners insist (Br. 38), however, that regardless of respondents' intent, the secular nature of their festivities, or the substantial distance in time and place from their wedding ceremony, the celebration they are asked to serve is nonetheless a "sacred event" because, for the owner, "marriage has inherently religious significance." But they suggest no limit to the reach of the Free Exercise claim emerging from that view. Presumably, any event celebrating or featuring a married or engaged same-sex couple could run afoul of the petitioners' beliefs and be subject to a refusal to provide service.

While the sincerity of those beliefs is not in question, the Court should reject petitioners' implicit argument that whenever a business owner's religious views are implicated by a customer's request in a commercial context, the owner is entitled to an exemption from public accommodations laws. The Free Exercise Clause demands religious exemptions in certain circumstances, even in the commercial context, but it cannot be read to require the sweeping, categorical accommodation the petitioners advocate, particularly as explained below, in the face of public interests as significant as those addressed in nondiscrimination statutes like CADA.

Having chosen to hold themselves out as a commercial public accommodation, serving members of the public generally, petitioners have relinquished the ability to withhold service based on their own preferences. Respect for religious liberty does not require creating an exemption from CADA where the proprietor disapproves of the customer or the customer's use of services

on religious or moral grounds, where the proprietor would not be required to participate in a religious ceremony against his will.

III. Granting A Religious Exemption From CADA On These Facts Would Harm Religious Liberty And Human Dignity

CADA's imposition on petitioners' religious exercise arises only as a result of his activity in the commercial marketplace. This burden is outweighed by the high costs of recognizing the religious exemption petitioners seek. Petitioners' claim that they are being forced to participate in something they *view* as religious is not limited in any meaningful way. Upholding that claim would invite a variety of religious exemptions that would fundamentally change expectations of equality in the commercial sphere. The rule petitioners seek to establish would subject any member of the public to the possibility that they might be denied service, at any time, without warning. Preventing that kind of uncertainty is precisely the kind of concern this Court has previously recognized in upholding the government's right to protect individuals against exclusion from public accommodations.

In *Heart of Atlanta Motel, Inc.* v. *United States*, the Court recognized the harm that flowed specifically from the uncertainty as to whether, at any moment, an individual would be denied service available to other members of the public. The Court noted the harm to the would-be traveler "when he continually was uncertain of finding lodging" and that "this uncertainty stemming from racial discrimination had the effect of discouraging travel." 379 U.S. 241, 253 (1964). In other words, the Court made clear that the proprietor's claimed right to

exclude had to be assessed not in isolation, but based on the cumulative impact of similar decisions that might be made by other merchants, and even possibly all providers of that service in a given community.

If there *were* alternative places of public accommodation that did not religiously object to serving the customers in question, the dignitary harm would still arise each time service was denied. As mentioned above, the Court has recognized that *any* "denial[] of equal access to public establishments" creates a "deprivation of personal dignity." 379 U.S. at 250. Because a customer would have no notice whether a particular merchant would refuse service, every commercial interaction would become an exercise in exposing oneself to potential humiliation.

The harms to individuals that would flow from the rule petitioners advocate is too great to be tolerated, even though their convictions are sincerely held. *Obergefell* v. *Hodges* itself observed that persons of faith might honestly disagree on religious grounds about same-sex marriage, but the Court simultaneously recognized that denying same-sex couples the right to make that choice for themselves, as a matter of their own religious conviction, deprived them of "equal dignity in the eyes of the law." 135 S. Ct. 2584, 2608 (2015). No matter how genuine the conviction of those who would deny them that right, for a same-sex couple seeking to celebrate the most special day in their life, not knowing whether a vendor will reject their business because of their sexual orientation "demeans the couple, whose moral and sexual choices the Constitution protects." *United States* v. *Windsor*, 133 S. Ct. 2675, 2694 (2013); see also *Obergefell*, 135 S. Ct. at 2590 (differential treatment also serves to "harm and humiliate the children of

same-sex couples" by causing them to "suffer the stigma of knowing their families are somehow lesser").

Ultimately, religious liberty itself would suffer if petitioners' arguments were adopted. Like most public accommodations laws, CADA prevents commercial discrimination on account of religion. Section 24-34-601(2)(a) prohibits denial of service on the basis of "creed," which is defined to include "all aspects of religious beliefs, observances, or practices," see 3 C.C.R. 708-1:10-2(H). But that protection could be rendered illusory if the Court were to uphold petitioners' arguments. If even the commercial act of selling a cake for a reception far removed from any religious ceremony qualifies for a religious exemption from CADA, then it is easy to foresee that many religious objections to serving a customer based on the customer's "religious beliefs, observances, or practices" would also have to be exempted. In the end, religious minorities would lose much of the protection that CADA affords them.

The state cannot tolerate an exemption of the kind petitioners seek, while still protecting the ability of all its citizens, including religious minorities, to participate fully in the commercial marketplace.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
JOHN MCCLAIN
EMERSON SIEGLE
ROPES & GRAY LLP

HEATHER E. KIMMEL
UNITED CHURCH OF CHRIST

K. HOLLYN HOLLMAN
JENNIFER L. HAWKS
BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY

MARY E. KOSTEL
COUNSEL TO THE PRESIDING BISHOP OF THE EPISCOPAL CHURCH

PHILLIP H. HARRIS
EVANGELICAL LUTHERAN CHURCH IN AMERICA

DONALD C. CLARK, JR.
CHICAGO THEOLOGICAL SEMINARY

OCTOBER 2017